Before the

Department of Agriculture
Rural Utilities Service
Broadband Initiatives Program
RIN: 0572-ZA01
and
Department of Commerce
National Telecommunications and Information Administration
Broadband Technology Opportunities Program
RIN: 0660-ZA28

Joint Request for Information
Docket No. 0907141137-91375-05

Executive Summary of Comments of The Wireless Internet Service Providers Association

In the Comments that follow, the Wireless Internet Service Providers Association ("WISPA") presents responses to the above-captioned Joint Request for Information and recommends changes to the broadband stimulus grant and loan process and policies for Round 2 of funding requests. WISPA's proposals, based in large part on the experiences of its members in both filing and challenging Round 1 applications, will streamline the application submission and review process and better ensure that funds are utilized for projects in areas where the need for broadband is greatest.

WISPA's recommendations include the following:

- The application process should be reduced to one step, with many of the documents and due diligence materials submitted by applicants selected for funding as a condition to closing on funding.
- Those required attachments containing applicant certifications should be included in the on-line application itself, and applicants should be permitted to amend their applications after submission up until the filing deadline.
- Applicants should have at least 60 days from release of the Round 2 NOFA to prepare and submit their applications.
- NTIA should make clear that the states' role is to establish priorities and comment on those applications that promote those priorities, and should discourage conflicts of interest that arise when a state submits its own application.
- Census blocks should be retained as the baseline unit for proposed service areas, but the mapping process should be improved to ensure more efficient use of application preparation time and to promote accuracy.
- RUS grants should be available only to small entities, and applicants with higher revenues should be eligible only for loans. The matching component for

applications proposing service to "unserved" areas should be reduced to ten percent.

- The agencies should disclose to the public more information about the applications.
- The outreach and support programs and communications should be improved, and inconsistencies in the application Guidelines should be eliminated.
- Service to last-mile end users should be the agencies' highest funding priority.
- Eligible applicants proposing to serve "unserved" areas should be (1) entitled to a priority if they are near or adjacent to the "unserved" area, (2) required to contribute only 10 percent of the project funding as a match, and (3) able to obtain funding for operating expenses in addition to broadband infrastructure costs. WISPA also urges NTIA and RUS to establish a priority for existing broadband providers with gross revenues of less than $5 million.
- The definition of "remote" should be eliminated as a basis for funding.
- The Public Notice Response process can be vastly improved with greater transparency and disclosure in both the application and the response.
- The prohibition on sale of funded assets should be eliminated if certain safeguards are implemented. Likewise, the security requirements for RUS loans should be relaxed to encourage private investment in broadband projects.
- The agencies should eliminate the restrictions on use of program income to allow reinvestment in operating expenses and service expansion.
- The costs to acquire spectrum at auction or in the secondary market should be eligible for the portion applicable to the funded period.
- Funding should be available for operating expenses for "unserved" areas.

These recommendations are discussed in detail in the accompanying Comments, and WISPA urges their adoption.

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The Wireless Internet Service Providers Association ("WISPA") hereby comments on the second Joint Request for Information ("Joint Request") of the Department of Commerce, National Telecommunications and Information Administration ("NTIA") and the Department of Agriculture, Rural Utilities Service ("RUS"), published in the Federal Register on November 16, 2009, seeking public input regarding the processes and policies for the second round of funding under the Broadband Initiatives Program ("BIP") and the Broadband Technology Opportunities Program ("BTOP").[1]

Introduction

WISPA represents the interests of more than 300 WISPs, vendors, system integrators and others interested in promoting the growth and delivery of fixed wireless broadband services to Americans. WISPA estimates that more than 2,000 WISPs operate in the United States today, and its ongoing research reveals that WISPs cover more than

[1] *See* 74 Fed.Reg. 58940 (Nov. 16, 2009).

2,000,000 square miles in all 50 states. WISPs provide fixed wireless broadband services to more than 2,000,000 people in residences, businesses, hospitals, public safety locations and educational facilities. The vast majority of WISPs are "small business concerns," as defined in the Small Business Act.

Many WISPs have received federal and state grants and loans to assist successful construction and deployment in rural areas. In particular, WISPs have utilized the RUS grant, loan and loan guarantee programs to fund community centers, educational services and broadband access in small, rural communities where demand is shown and the WISP can meet that demand. WISPs have been very involved in existing grant and loan programs and proved to be responsible stewards of public funding.

WISPA filed Comments in response to the Joint Request for Information for the first funding round.[2] Many WISPs also applied to NTIA and RUS for grants and loans during the first funding round and are eagerly awaiting decisions that could facilitate broadband service to rural, unserved and underserved areas of the country. In addition, as "existing broadband providers," some WISPs filed Public Notice Responses to applications for ineligible areas. WISPA is pleased that NTIA and RUS are open to considering changes in the procedures and policies for Round 2. WISPA's participation in the Round 1 Notice of Funds Availability ("*Round 1 NOFA*") process and its members' experiences in both the application and challenge processes provide perspective and valuable insight that will inform the agencies' decision-making process. WISPA's responses to the specific questions presented in the Joint Request follow.

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[2] *See* Comments of WISPA, Docket No. 090309298-9299-01, filed Apr. 10, 2009 ("WISPA Round 1 Comments").

Responses to the Joint Request for Information

I. The Application and Review Process

A. Streamlining the Applications.

WISPA agrees that the application process for Round 1 was overly burdensome for a number of reasons, and urges NTIA and RUS to adopt their "tentative conclusion" that the process should be streamlined. WISPA offers a number of suggestions to reduce burdens on applicants for the "compressed schedule"[3] for Round 2.[4]

First, WISPA believes that the two-step process should be reduced to a single-step application that focuses on compliance with eligibility standards rather than on satisfaction of closing conditions. Some documents that were required in the upload section of the application or that were required in the step two due diligence phase should be included in the application, but many of the second-step requirements should be deferred until closing on a grant or loan, as is the case with the fidelity bonding requirement.[5] A one-step application process would make it less complicated and time-consuming for applicants and would lead to higher quality applications, and requiring only those applicants selected for funding to provide certain closing documents will make review, assessment and post-award monitoring more efficient. In addition, NTIA and RUS should allow at least 60 days following the release of the second Notice of Fund Availability to submit applications, given governmental concerns "that a small entity would have difficulties completing the application in a timely manner."[6]

The professional engineer certification should not be required as part of the application, but rather should be delivered by the applicant with respect to the detailed network design once selected for grant as a condition to closing on the funding instruments. As WISPA and others wrote in a letter to NTIA and RUS in July 2009, "the time to prepare the network diagram and system design, locate and retain a qualified professional engineer and enable the professional engineer to do the work may make it impossible for many applicants to meet the [filing] deadline."[7] In addition, the July Letter explained that:

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[3] *See* Statement of Mark L. Goldstein, Director, Physical Infrastructure Issues, Government Accountability Office, Testimony Before the Committee on Commerce, Science, and Transportation, U.S. Senate, "Preliminary Observations on the Implementation of Broadband Programs," Oct. 27, 2009 ("GAO Testimony"), at 3.

[4] Many of these suggestions are discussed in the letter attached as Exhibit 1 hereto that WISPA and others submitted to NTIA's Inspector General on October 8, 2009 ("NTIA IG Letter"). The NTIA IG Letter is incorporated herein by reference.

[5] *See Round 1 NOFA* at lines 1702-05.

[6] *See* GAO Testimony at 7.

[7] *See* letter from Stephen E. Coran to David J. Villano and Anthony Wilhelm, July 24, 2009 ("July Letter"), at 3. A copy is attached as Exhibit 2 hereto and is incorporated herein by reference.

> The certification requirement should not be relevant to an applicant's basic eligibility, which can be readily determined by internal RUS and NTIA engineering staff review. The absence of an engineering certification in light of the other extensive application requirements should not render an applicant ineligible for consideration. Potential applicants with solid network and system design would not concede before filing, but would rather submit applications knowing that, *if selected*, a professional engineering certification would be required before funds could be received.[8]

Further, there is no reason to require the engineer to be licensed in the state(s) where the project is located. This Round 1 obligation created artificial jurisdictional requirements that are irrelevant to the technology used and could lead to engineers not qualified in a particular technology to render certifications about things they did not know about. More likely, the applicant would have to spend an inordinate amount of time finding a professional engineer and educating that engineer about the application, at the expense of completing and improving other aspects of the application.[9] In addition, the language of the engineering certification requiring the engineer to make statements about the applicant's *future* compliance with construction milestones should be changed as recommended in the July Letter.[10] The professional engineer should be certifying about the final, detailed network design and detailed build-out schedule, so those step two requirements should be shifted to closing as well.[11] The description of measurable service metrics required for BIP applications should be a closing condition alongside the detailed network design and build-out schedules.[12] By requiring a single certification to be delivered at closing and covering all of the technical aspects of the application, the application submission and review processes will be streamlined and the quality of funded projects will be assured.

Similarly, applicants should not be required to include a legal opinion in the initial application. The loan/grant documents undoubtedly will require a legal opinion to be current at the time of closing on the funding instruments, so it is not necessary to also require a legal opinion at the initial stage of the application process. Moreover, there was some confusion about the language of the opinion itself, which some lawyers were reluctant to sign because the grant/loan documents were posted only a few days before the filing deadline and certain of the suggested language was not acceptable to them. Although the Help Desk provided some clarification and indicated a willingness to accept different language, it took a day or so to get this information and, even after the advice was received, there was still some confusion over what was required. In any event, given that a legal opinion would be required at closing anyway with respect to the final

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[8] *Id.* at 4 (emphasis in original).
[9] Even the modification in the July 31, 2009 FAQ update was somewhat curious in that it changed the requirement for applicants applying only for BTOP funds, but not those applying to BIP. Applicants applying to both agencies were forced to comply with the stricter RUS requirements.
[10] The July Letter suggested replacement language for the engineer's certification. *See* July Letter at 5.
[11] *See Round 1 NOFA* at lines 1054-60.
[12] *See id.* at 1069-73.

grant/loan documents, the legal opinion should not be required of all applicants to help determine eligibility.

Likewise, the environmental questionnaire required as part of step two should be deferred until closing.[13] Applicants that are not selected should not have to go through the time and effort to complete the documents during the application phase. Moreover, in some cases where the acquisition or lease of buildings, towers, ducts or conduit have not been completed, it would be premature to require applicants to provide detailed environmental disclosures. To the extent a portion of an application does not meet environmental standards, the proposal could be modified prior to closing on the funding instruments. Assuming these cases would be rare, it would be more efficient to require detailed environmental information as a closing condition rather than require each applicant to include it as part of the application itself.

By making disclosure of the above documents closing conditions, applicants can focus their efforts on other parts of the application that focus on the specific project benefits and reviewers can be assured that they will not be required to assess the nuances of engineering certifications, legal opinions and environmental documents for applicants that are not deemed eligible for funding. WISPA urges adoption of these proposals.

Aside from the submission of those above-discussed documents that should be provided at closing, certain other documentation can be included in the one-step application. For instance, it should not be difficult for the applicant to provide a list of outstanding obligations and a description of working capital because the data used to prepare this information would derive from the financial data already required in the application.[14] Underlying documentation supporting the application also can be shifted to the one-step application, assuming the agencies allow at least 60 days from issuance of the Round 2 NOFA to submit applications.[15]

The agencies should establish guidelines to ensure that underlying supporting letters and documentation are meaningful and not just a convenience. Supporting documentation from investors, vendors and partners should, at a minimum, state that the signatory has reviewed and is familiar with the project. For investor documentation, the documentation should also state the amount of the project and the funding commitment, and provide evidence that the funds are available in the committed amount. For last mile providers supporting middle mile projects, the documentation should indicate the last mile provider's service area, an overview of its technology, its locations of interconnection, basic engineering data for the last mile provider's projects that will be served by the middle mile project, and evidence that a real commitment has been made to interconnect, such as via a letter of intent or preliminary agreement on terms of interconnection. In the absence of engineering data for the last mile provider's project, it must be shown that the last mile provider is already engaged in providing last mile

[13] *See id.* at lines 1061-65.
[14] *See id.* at lines 1051-53.
[15] *See id.* at lines 1066-68.

services to the general area, but that their further expansion has been hindered by lack of adequate middle mile capacity.

NTIA and RUS also ask whether certain attachments should be eliminated from the application. WISPA believes that the process can be streamlined if the several separate certifications (for example, Attachments N-Q) – which were required to be signed in ink, converted to a .pdf file and uploaded as attachments to the application – were instead included as part of the on-line application itself. That way, the applicant's signature on the on-line application would incorporate the certifications. This small gesture will reduce burdens on both applicants and the agencies' servers, without any change in the substance of the certifications.

WISPA does not have preference about whether the agencies should use one application form or two. If the agencies determine that a single application should be used for Round 2, WISPA recommends that the application be better organized to place all of the BTOP-only questions in one place and all of the BIP-only questions in another place, rather than interspersing the application with numerous places where BTOP-specific and BIP-specific questions were asked. The Round 1 application form proved to be confusing in this regard.

Also, the application software should permit applicants to submit portions of their applications as they are completed, rather than all at once, and to have the ability to change that information at any time prior to the filing deadline. By giving Round 1 applicants only one opportunity to submit their applications and preventing changes after submission, applicants were not able to make even small changes before the deadline. This encouraged applicants to wait until the eleventh hour to file, which further constrained the capacity of the agencies' servers and resulted in applications that could not be changed in time to correct even minor errors or reconcile discrepancies. Further, for some would-be applicants, there was insufficient remaining time to respond to unforeseen circumstances and system bugs that prevented the successful submission of an application.

For Round 2, the on-line application can be configured to have both a final "submit" step followed by a final "commit" step. The "submit" step would perform all final processing of an application and implement any system logic necessary for processing, but would still allow later revisions in advance of the deadline. The "commit" step would simply set a flag to "on," indicating that the applicant stated that they are finished and have no further submissions. At the deadline, all applications that had previously been "submitted" would automatically be committed by setting the "commit" flag setting to "on."

1. New Entities.

WISPA does not recommend any changes to the application process for new entities that are created to apply for BTOP or BIP funding. If new entities were not required to submit historical financial statements of its affiliates, the agencies would have

no historical basis by which they could test an applicant's expected performance under the grant or loan. The result could be the filing of "sham" applications by new entities seeking to obtain funding notwithstanding the demonstrable track record of existing applicant entities that keep good books and have a good performance record. WISPA does not believe that preserving this requirement will deter legitimate applicants from forming new joint ventures of other combinations.

2. Consortiums and Public-Private Partnerships.

NTIA and RUS ask how the application should be revised to reflect the participation of consortiums and public-private partnerships. WISPA believes that information about each member's proposed contributions and proof that the listed partners have agreed to partner are appropriate considerations. Requiring further information could be disruptive to the effort to form important partnerships involving multiple entities. For example, it would not be appropriate for the applicant to be required to include any financial information about each consortium member or partner.

NTIA and RUS must also provide applicants with sufficient time to obtain partners, whether from government or the private sector. While the process of forging those relationships can already be underway, in some cases they cannot be finalized until the final funding requirements are released, and applicants will need an appropriate period of time – 60 days – to incorporate and document their relationships into the application. This is especially true of local governments, which may require public meetings, resolutions or other actions to authorize partnering with private sector applicants.

WISPA also is concerned that, in some cases, states are favoring those applicants that support the state's own broadband stimulus funding application, and are thus refusing to support other applicants. Given the states' role in (in some cases) commenting on, ranking and/or evaluating applications from the private sector, this creates an inherent conflict of interest. The agencies should make clear that the states should first establish priorities (*e.g.*, geographical, last-mile/middle-mile) that are made public, and then limit their written comments to identifying those applications that support those priorities.

3. Specification of Service Areas.

WISPA wholeheartedly endorses the use of census blocks to define proposed funding areas. WISPA promoted this concept for Round 1[16] and continues to believe that census blocks provide the most granular level of data collection and thus helps ensure that funds can be targeted to locations that most need funding assistance.

The purported burdensome nature of designating census blocks lie not with the unit of measure, but rather with the way that applicants were required to map their

[16] *See* WISPA Round 1 Comments at 8.

proposed funded service areas. WISPA agrees with the points made in the NTIA IG Letter:

> By many accounts, the mapping requirement presented significant problems. First, applicants spent thousands of dollars researching vendors and purchasing mapping information only to find out later that the online application system was restricted to the agencies' proprietary software. Applicants were afforded no notice prior to seeing the online version that this would be the case. Second, applicants were unaware until they viewed the mapping tool that the information was organized according to county, not by census blocks, creating some confusion and requiring applicants to determine from other census databases where the census block boundaries were located and then overlay their census blocks on top of the county maps. Perhaps the mapping software can be upgraded to include census block overlays. Third, some applicants painstakingly researched each census block within their proposed service areas and typed these into an exhibit or response. Applicants were unaware that the mapping tool would designate the census blocks automatically. Had applicants been aware of this convenience, they could have saved many hours of time inputting the census block data. Fourth, it was not clear from the instructions what information was required on the maps.
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> Perhaps most significantly, it was extremely time consuming for many applicants to draw maps using the agencies' software. As another means to provide mapping data, instead of drawing maps applicants should have the option to identify and upload their census blocks in a standard format using the 15-digit FIPS code. This method would create a nationwide database and a unique number for each census block which could then be used to automatically draw the service area maps without any hand-editing and generate an internal nationwide map for the agencies' data analysis. This would have been much easier for applicants and would have generated maps that were more accurate than the hand-drawn maps.

Thus, there are improvements to the unwieldy mapping system that should be made to improve the ability of applicants to accurately show their proposed service areas and thus alleviate any claims that the use of census blocks was burdensome.

4. Relationship between BIP and BTOP.

In Round 1, the joint application could be confusing in some situations but on balance was probably a reasonable approach to reduce the amount of time required to complete the applications if one was applying to both funding sources. In addition, it would have been more confusing in public-private partnerships with two separate applications.

However, for Round 2, WISPA believes that applicants proposing service to rural areas should not have to "fail" the BIP loan process in order to be considered for BTOP grants. Round 1 applicants that did not want to apply for loans were nevertheless required to submit information in an application just to show that RUS could not fund the proposal so it could be sent to NTIA.[17] This process also required both agencies to look at those applications, which unnecessarily increased the review time. Because of the tight award timelines in Round 1, both agencies evaluated the applications for entities filing for both BIP and BTOP funding whether or not BIP ended up rejecting the applicant. A compressed timeline is expected for the Round 2 as well, so it makes sense to give the applicant a choice as to which funding source the applicant prefers if both agencies are willing to fund the proposal.

In Round 1, many smaller applicants preferred BTOP funding due to the 80 percent grant but couldn't come up with the 20 percent match requirement. BIP on the other hand had no cash requirement, but offered only 50 percent grant funding in most cases. The cash match is often a problem for smaller entities, yet smaller entities are more in touch with what is actually needed in their communities and thus represent a more effective way to use the available funds. For Round 2, WISPA recommends that companies below a certain threshold of total revenues be eligible for an 80 percent grant and 20 percent loan funding. Companies over that threshold should have access to a smaller grant component, eventually diminishing to 100 percent loan funding.

In addition, to encourage more participation by small companies, NTIA should alter its matching funds requirements.[18] First, non-cash contributions to the match should be treated the same as cash contributions. This will encourage applicants to leverage existing infrastructure rather than allocating cash in order to gain a competitive advantage, a result that could reduce the amount of funding. Second, under a blanket waiver, NTIA should reduce the 20 percent matching requirement to 10 percent for "unserved" areas. This would encourage applicants to apply for areas most in need of broadband service by providing them with necessary and appropriate additional financial relief.

B. Transparency and Confidentiality.

WISPA believes that the public is entitled to more disclosure of information in BTOP and BIP applications. Other than financial and proprietary vendor cost information, which should remain confidential, all other aspects of the application should be made public so that the public can have a better sense as to how the government proposes to spend taxpayer dollars. If the agencies are not willing to require such full disclosure, at a minimum public notice of the executive summaries, open access obligations, lists of all census blocks and anchor institutions, system diagram/technical plan and management descriptions should be made public.

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[17] It was also ironic that a Round 1 application for a rural area would potentially be forced to have only 50 percent grant funding while an application that either failed RUS's requirements or was in a non-rural setting could get up to 80 percent grant funding.

[18] *See Round 1 NOFA* at lines 709-31.

C. Outreach and Support.

WISPA commends the efforts of NTIA and RUS in conducting workshops, issuing application guidelines, issuing responses to Frequently Asked Questions and establishing a Help Desk. In general, these programs worked effectively and provided transparency to the public.

WISPA offers a few suggestions for Round 2. First, the process of notifying registered potential applicants of changes or updates to the application process should be improved. Instead of relying solely on an on-line public notice, the agencies should also simultaneously broadcast e-mail notices of changes and updates to all registered potential applicants, thereby providing more certain and timely notice. A proactive notification system would have been especially important under the deadline conditions that existed when the application due date was extended for Round 1 and when the upload process faltered on the final due date.

Second, as described in the NTIA IG Letter, there were a few cases where the BTOP and BIP Guidelines were inconsistent with each other.[19] Greater care should be taken to ensure that the Guidelines are consistent with each other – perhaps publishing one set of Guidelines would have prevented this problem.

Third, while the FAQ responses were very helpful, they should have been published with greater frequency, and it should have been made clear at the time that there would be no further FAQ responses after the July 31 posting.

Fourth, because it was no doubt overwhelmed, the Help Desk sometimes took several days to respond, delaying the ability of applicants to move forward with the application process. If some of the questions commonly asked of the Help Desk had been answered as FAQ responses, perhaps there would have been less need at the Help Desk to provide the same answer to multiple potential applicants. All in all, the outreach and support mechanisms worked well, and with a few changes can work better in Round 2.

D. NTIA Expert Review Process.

WISPA does not believe it would be prudent to rely on unpaid experts as BTOP reviewers. WISPA believes that NTIA staff acquired sufficient knowledge in Round 1 to make funding decisions for Round 2. By contrast, the expert reviewers will need to be trained, at some time and expense, and WISPA believes that many qualified individuals did not want to participate as reviewers because of the restrictions on future representation of applicants.

[19] *See* NTIA IG Letter at 5.

II. Policy Issues Addressed in the NOFA.

A. Funding Priorities and Objectives.

WISPA favors giving priority to applicants proposing to serve "unserved" areas that are located near their existing service areas (for example, adjacent to or within a certain distance). In reviewing the list of applicants for Round 1, it appears that many applications were filed by entities that have no existing relationship with the proposed funded service area. WISPA believes that in cases where there are more than one application filed for the same area, eligible, existing, local broadband providers should be given a funding priority over qualified non-local applicants. This will make service deployment more efficient and economical because a local provider will be better able to leverage existing its assets. It will also encourage local consortiums and public-private partnerships where broadband assets can be combined.

1. Middle Mile "Comprehensive Community" Projects.

Whether the focus for Round 2 should be on funding middle mile projects depends in some respects on those projects that are funded in Round 1. Nevertheless, WISPA believes that the emphasis in Round 2 should be on funding infrastructure for last-mile service to end users.

The ultimate objective of the broadband stimulus programs is to provide access to end users. Many regions of the country have middle mile fiber. But middle mile capacity often is not routed to where a last-mile user needs it, or the connectivity costs are not competitive. Middle mile fiber that connects key institutions is going to take the least expensive route to connect those institutions. Middle mile providers are not going to incur the expense of running fiber to towers or meandering through underserved communities – and middle mile connections near, but not in, an "unserved" or "underserved" community is not sufficient.

Middle mile fiber networks are typically designed to serve and meet the interconnection needs of last mile wired networks that are also typically deployed at ground level. Such fiber networks may not adequately extend to the locations needed by wireless Internet service providers, such as tower locations and/or high elevation mountain tops which may not be populated or have geographic barriers preventing the extension of fiber. A large problem today is that wireless towers cannot obtain line-of-sight to fiber ramps or "meet me" rooms, because the "meet me" rooms are located at ground level real-estate blocked by ground elevation, hills, trees or other buildings.

In addition, the funding need is to actually get services to people who do not have service. Even where middle mile is available in an area, it is often not economically justifiable to provide last mile service; if it were practical or economically feasible without government funding, the services would typically already be available. Adding even more middle mile capacity does not solve this fundamental problem.

In addition, an awarded Round 1 BTOP/BIP middle mile fiber grant should not disqualify eligibility of a Round 2 middle mile grant application that may propose overlapping service areas where the Round 2 grant applicant demonstrates that it is proposing middle mile connectivity to unique specific locations and distribution points that are not adequately served, and can not reasonably reach to interconnect with a Round 1 applicant's fiber network interconnection points.

2. Economic Development.

Though the thrust of the ARRA stimulus act is overall job creation and economic stimulus, it is not a productive use of time for an applicant, especially a small business, to estimate economic development impacts. If the service is needed, economic development will occur. There is no real way to ensure economic projections are anything but speculative and consume time better spent creating a stronger application.

3. Targeted Populations.

Anyone who does not have broadband access doesn't have access . . . it doesn't matter if they are rich or poor, whether they live near a city or in the country. And if there is not access in this day and age, then there is almost certain to be an economic reason why there isn't access yet. And the value to society of having them connected is just as strong. Social factors or geographical location should not be nearly as important as the simple question: is broadband access available?

For example, a census block can easily have cable modem coverage along one bounding road while three other bounding roads have none and are not densely enough populated to ever get access. This can easily be in a non-rural area – yet it is just as important that these households get service as it is for anyone else, and it is just as unlikely they'll ever get it outside of a grant. It is worth emphasizing that a middle mile project will never help them either – only a last mile investment can meet these needs.

4. Other Changes.

The requirements for Round 2 should favor projects proposing to serve "unserved" areas. WISPA proposes elsewhere in these Comments that eligible applicants proposing to serve "unserved" areas should be (1) entitled to a priority if they are near or adjacent to the "unserved" area, (2) required to contribute only 10 percent of the project funding as a match, and (3) able to obtain funding for operating expenses in addition to broadband infrastructure costs. Taken together, these benefits will improve the business case for funded service to "unserved" areas such that it will be more attractive for applicants to apply for these areas.

WISPA also urges NTIA and RUS to establish a priority for existing broadband providers with gross revenues of less than $5 million. Smaller broadband providers generally are more in touch with their communities, know precisely where the

community's broadband needs are and, as such, represent a superior investment of federal dollars.

WISPA believes that the objective point system utilized for BIP is better than the subjective evaluation criteria used for BTOP. A point system enables applicants to have more certainty about the strength of their applications and provides the agencies with greater consistency in the way applications are compared.

B. Program Definitions.

For Round 2, NTIA and RUS should retain the definition of "unserved area" and simplify the definition of "underserved area." The definition in the *Round 1 NOFA* of "unserved area" appropriately considers the lack of availability of broadband service and the inability of consumers to readily subscribe to broadband service. The definition of "underserved" should be revised to eliminate the criterion that considers an area "underserved" if there is a broadband provider advertising speeds of 3 Mbps or more in the area. WISPA believes that the 50 percent availability and 40 percent subscription rates should be the sole factors used to determine whether an area is "underserved."

This definitional change will make it easier for applicants to justify that an area is "underserved." Instead of having to rely on inaccurate or incomplete data sets regarding subscription rates, they can simply identify the areas where broadband competition is present. Further, by retaining the existing definition, the agencies will be forced to assess Public Notice Responses that will be difficult to weigh against the applicant's justification (even if the changes to the challenge process described below are implemented). With respect to the speed component, in nearly every area of the country that is not "unserved," at least one broadband provider advertises those speeds, so it is believed that few applicants could make the case that this criterion applied. Further, using advertised speeds can yield misleading results, and using average or peak speeds would require verification by the agencies, a task they likely do not have time to perform.

WISPA believes that "remote areas" should not be given special treatment for Round 2. Although well-intentioned, very few areas qualified as "remote," and thus very few applicants could take advantage of the 100 percent BIP grant funding mechanism. Substantively, the distance between an urban area and a "remote" proposed funded service is irrelevant – if the consumer cannot access broadband services wherever he or she may be, that should be sufficient for the area to qualify. The definition of "remote" should be eliminated as a basis for funding.

WISPA proposes no changes to the definition of "broadband." The definition utilized in Round 1 is reasonable. To change it now, after mapping projects are underway, would be disruptive to the mapping process as well as ongoing research that Round 2 applicants may be undertaking.

C. Public Notice of Service Areas.

In the absence of the completion of mapping under the Broadband Data Improvements Act and the Recovery Act, the agencies must rely on public participation to ensure that proposed areas are entitled to funding. Unfortunately, the Public Notice Response process used by NTIA and RUS for Round 1 was flawed in a number of respects. As the association representing both applicants and "existing broadband providers" that filed responses, WISPA wants to ensure that the process is fair and transparent, and provides greater certainty that funds are not granted or loaned for areas that should not qualify for funding.

WISPA generally believes that applicants were not afforded sufficient time to demonstrate that the methodology used to determine whether each proposed funded service area met the definition of "unserved" or "underserved" (Q17 on the application). Indeed, the lack of mapping in many states made this a challenge. In addition, the application limited the number of characters that applicants could use to document the "unserved" or "underserved" nature of the proposed funded area. In some cases, applicants indicated that they proposed area met all three of the criteria for "underserved" even where they did not provide the methodology for each criterion, yet these applicants are entitled to a presumption that the areas qualified. Together, these circumstances created a lack of accuracy that no doubt led to the filing of a great many responses. Worse, the agencies are at risk for funding projects that are not truly in need of governmental support. The goal should not be to reduce the number of challenges so much as to make sure the agencies have the best possible data with which to make their decisions.

The response process was flawed in that existing broadband providers did not have access to the methodology the applicants submitted. Quite possibly, releasing this information to the public would have led to the filing of fewer responses, or more detailed responses that gave the agencies a better record upon which to make a final determination. Either way, the process of reviewing thousands of poorly crafted responses and possibly hundreds of poorly justified methodologies is no doubt delaying the agencies' ability to proceed to the due diligence phase for Round 1.

First, the application should not limit the number of characters an applicant can use to describe the methodology for determining whether an area is "unserved" or "underserved." This will encourage applicants to do a better job of justifying why a particular area is entitled to funding.

Second, as noted above, the applicant's methodology should be disclosed as part of the application made available for public review. This will not only encourage applicants to be more accurate, but will lead to fewer responses and, in cases where responses are filed, they will be more fact-based and thorough.

Third, a respondent should also be required to disclose its methodology for determining whether the area is "unserved" or "underserved." If respondents know that their methodology will be made public, this might encourage more accuracy and credibility in the responses. In addition, as an alternative to showing that the application does not propose service to claimed "unserved" or "underserved" areas as defined under the existing quantitative existing criteria, the respondent should be permitted to submit qualitative evidence that a funding award would cause severe harm to the sustainability and survivability of the respondent's operations. Instead of not funding the application as a whole in these cases, the agencies could eliminate those census blocks that overlap the respondent's service area and fund the remaining census blocks. Thus, in those specific census blocks where a respondent has significant market share and can show it is adequately providing service comparable to that proposed by the grant applicant, reducing the size of the funded area would direct funds to areas in need without harming an existing broadband provider's business in discrete census blocks. Any applications that are subject to this qualitative analysis would not be ineligible or otherwise suffer a loss of points in the evaluation phase, but would simply be funded for a smaller area where the protest either did not apply or was not deemed to be credible.

Fourth, the agencies should make clear that the "existing broadband provider" operates broadband facilities in the proposed funded service area at the time the application was filed. For instance, responses should not be permitted where the challenging party operates broadband facilities in other areas or where the respondent pledges to provide broadband service in the area at some future point in time. WISPA is aware that both of these examples arose during Round 1, and they should not be permitted to clog the system in Round 2.

Fifth, as suggested by the House Small Business Committee, NTIA and RUS should adopt a "formal process to reconcile conflicting data from an applicant and an existing broadband provider."[20] By allowing each party to question the other's data, this will encourage the applicant and the challenger to submit accurate information and thus inserts another check in the system to ensure that the agencies are making funding decisions with the most accurate information.

WISPA appreciates that Public Notice Response process has created delays and, because of the lack of quality in both applications and responses, will lead to difficult decisions. By implementing the above recommendations, WISPA believes the process will operate at a higher level for applicants, respondents and the agencies.

D. Interconnection and Nondiscrimination Requirements.

WISPA agrees that NTIA and RUS should not make any changes to the interconnection and nondiscrimination requirements used for Round 1. The agencies

[20] Letter dated November 17, 2009 from House Small Business Committee to Hon. Lawrence E. Strickling and Hon. Jonathan Adelstein ("Small Business Committee Letter")

should make clear that any funding recipient will agree to abide by the rules that the FCC adopts in its ongoing network neutrality proceeding.[21]

E. Sale of Project Assets.

The general prohibition on the sale or lease of funded broadband facilities[22] is overly restrictive and, as noted by the House Small Business Committee, "creates a significant barrier" for WISPs and other small entities.[23] In fact, in some cases, potential applicants elected to not participate in Round 1 because of this restriction. Those applicants that applied for funding recognized this prohibition as one of the biggest – if not these biggest – post-award restriction.

WISPA thus recommends that this prohibition be substantially revised to enable awardees to sell or lease funded broadband facilities at any time following the approval of funding if (a) the agreement is pursuant to an arms' length business transaction under which the original grantee/borrower is not unjustly enriched, (b) the assignee or lessee agrees to be bound by the terms of the grant or loan agreements, and (c) the assignee or lessee is deemed to have the financial, management, operational and compliance experience necessary for the agencies to ensure that the infrastructure will be transferred to the new grantee/borrower and the project will be implemented and sustained as proposed in the application. The original applicant and the proposed assignee or lessee would file documentation with NTIA or RUS (as the case may be), and the agency would have a certain period of time (*e.g.*, 30 days) to approve the transaction. To determine whether there is "unjust enrichment," the agencies should ensure that the transaction does not value the funded broadband equipment at more than ten percent above its fair market value at the time of the transaction.

This change should apply not only to Round 2 awardees, but should also apply to Round 1 fund recipients. No party would be prejudiced since the change would *remove* a barrier and there is no policy reason to have two sets of post-award rules, one for Round 1 and one for Round 2.

In addition, WISPA strongly urges the agencies to modify the requirement that grants RUS a security interest in "all other assets of the applicant and any other signer of the loan documents that are available to be pledged to RUS."[24] WISPA agrees with the House Small Business Committee that this requirement discouraged applicants with existing loans, particularly small businesses, from filing in Round 1. Further, in cases where assets are owned free and clear, they would become encumbered and assets previously pledged as collateral would be subject to negotiation between RUS and previous lenders.[25] In Round 1, applicants were forced to either spend precious time

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[21] *See* Notice of Proposed Rulemaking, In the Matter of Preserving the Open Internet; Broadband Industry Practices, FCC 09-93 (rel. Oct. 22, 2009).
[22] *See Round 1 NOFA* at lines 1731-41.
[23] Small Business Committee Letter.
[24] *Round 1 NOFA* at lines 1709-10.
[25] *See* Small Business Committee Letter. *See also Round 1 NOFA* at lines 1711-14 (granting RUS exclusive first lien position unless arrangements can be made with lenders).

negotiating with existing lenders to take a subordinate position or forego filing altogether. Only facilities actually funded through an RUS loan should be pledged.

As recommended above with respect to restrictions on assignment or transfer of broadband facilities, the relaxation of the security requirements should apply to both Round 1 and Round 2 awardees. The change would remove a barrier, would not be prejudicial and would ensure that all borrowers are playing by the same set of rules.

F. Cost Effectiveness.

NTIA and RUS correctly state that the costs to build out a project will vary based on the circumstances, and that rural companies – which include many WISPs – have much higher construction costs than companies operating in densely populated areas. This fact alone demonstrates why some areas of the country remain "unserved" or "underserved" – the costs to construct and operate are too high for any broadband provider to have served the area, and justifies the need for funding.

The question should not be framed in terms of absolute cost, but as a relative cost, *i.e.*, do the infrastructure costs proposed by one applicant for a proposed area exceed by a certain percentage the costs proposed by another applicant for the same area. To ensure that costs are not overstated, the agencies should consider establishing and publishing a set of cost guidelines based on Round 1 projects and require applicants for Round 2 to stay within those parameters unless they can demonstrate why higher costs are necessary.

G. Other.

WISPA has several additional recommendations for Round 2. First, the agencies should relax the restrictions on the use of program income generated from the funded project. Under the *Round 1 NOFA*, "any *program income* generated by a proposed project during the grant period shall be retained by the grant recipient and shall be added to the funds committed to the project by RUS or NTIA and the recipient. The grant recipient should use *program income* to further eligible project objectives, including reinvestment in project facilities"[26] As WISPA understands this requirement, awardees cannot reinvest any portion of their program income for operating expenses that could be used to maintain, expand or improve broadband service, or use the income to service their debt. For instance, under the *Round 1 NOFA*, wireless companies with relatively low capital expenses cannot obtain grant funding for recurring tower leases, electricity and middle mile access that are necessary to sustain service in "unserved" areas. They also are prohibited from using the funds to pay back any pre-existing loans or loans obtained to help fund the project (*e.g.*, a matching contribution). WISPA questions the rationale of a requirement that prevents investment of program funds for ongoing operational expenses used to make the project more sustainable, expansion of service to new areas or debt service. The agencies should not impose this restriction for Round 2, and should

[26] *Id.* at lines 832-34 (emphases added) (income is defined as "gross income earned by the recipient that is either directly generated by a supported activity, or earned as a result of the award during the funding period").

eliminate it with respect to Round 1 recipients, who would similarly benefit from the ability to reinvest income in operating expenses and service to new areas.[27]

Second, the agencies should reverse their determination that the costs to acquire spectrum through an FCC auction or lease spectrum in a secondary market transaction are ineligible for BTOP or BIP funding.[28] This restriction is contrary to the technology neutral mandate of the Recovery Act[29] and unfairly prejudices companies seeking to rely on licensed spectrum, which serves the same purpose as fiber, cable and other broadband distribution technologies that are entitled to funding. Instead of an absolute bar, and to ensure that the government is not funding the cost of long-term spectrum use under a three-year funding program, NTIA and RUS should allow award funds to cover the portion of such spectrum acquisition and lease costs that are applicable to the three-year funding period. Thus, if the spectrum is leased for 30 years, only ten percent of the costs would be covered by the grant or loan.

To the extent the Round 1 restriction on using grant or loan proceeds for spectrum is intended to ensure that RUS has adequate security, the eligibility of such costs should not be a concern. For spectrum leases, RUS could take a security interest in the spectrum lease agreement. For FCC licenses acquired at auction, RUS has existing authority under the FCC's 2004 *Rural Order* to obtain a security interest in FCC licenses as collateral for RUS loans, conditioned upon FCC approval of any transaction in which RUS seeks to foreclose on the license in question.[30]

Third, agency funding should be available for certain operating expenses as well as capital expenses in "unserved" areas. Such expenses could include marketing, training and installation. In these areas, especially given the higher costs to construct as well as operate broadband systems, limiting funding to capital expenses only may still be insufficient to show a sustainable project.

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[27] *See also* Small Business Committee Letter.

[28] *See Round 1 NOFA* at lines 781-82.

[29] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(e)(1)(C) (2009).

[30] *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078 (2004) ("*Rural Order*") at ¶¶47-58.

Conclusion

WISPA believes that adoption of its recommendations will vastly improve the application process and facilitate funding to areas most in need by those most qualified to provide broadband service and best utilize taxpayer dollars. WISPA looks forward to Round 2 and urges NTIA and RUS to incorporate its recommendations into the Round 2 NOFA.

Respectfully submitted,

THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

November 30, 2009 By: */s/ Richard Harnish, President*
/s/ Tom DeReggi, Vice President and Chair of Legislative Committee

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Exhibit 1

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July 24, 2009

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Deputy Associate Administrator, Infrastructure Division
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Re: ***Notice of Funds Availability***
Broadband Initiatives Program and Broadband Technology Opportunities Program
Emergency Request to Defer and Modify Professional Engineer Certification Requirement

Dear Messrs. Villano and Wilhelm:

On behalf of a diverse group of interested parties that includes a broadband trade association, potential applicants, consultants and professional engineers,[1] we respectfully request that the Department of Agriculture and the Department of Commerce (together, the "Departments") modify their requirement that all applications seeking more than $1 million in the first round of Broadband Infrastructure funding must contain a certification from a professional engineer registered in the state where the proposed broadband service will be provided. We believe that this requirement's unintended consequence will be to dramatically limit the number and quality of applications submitted for funding. Instead, the Departments should take three actions. *First*, rather than make the certification an eligibility requirement applicable to all applications, the Departments should require that only those applicants selected

[1] The parties to this Request are listed in Exhibit 1 hereto.

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for funding must submit a certification at the time the grant or loan/grant contracts are executed. *Second*, the Departments should eliminate the requirement that the professional engineer be registered in the state where the project is located. *Third*, at a minimum, the language of the certification must be modified so that it does not represent the applicant's compliance with future build-out requirements not within the professional engineer's control. Because of the impending August 14, 2009 deadline for submitting applications in the first funding round, the signatories request that this action be taken as soon as possible by notice placed on the www.broadbandusa.gov web site and by publication in the Federal Register.

Background

In the Notice of Funds Availability ("NOFA"),[2] the Departments detailed the requirements for the filing of applications for federal funding under the Section 6001 of the American Recovery and Reinvestment Act of 2009.[3] Although not specifically required by the Recovery Act, the NOFA states that applicants seeking funding under the Broadband Initiatives Program ("BIP") administered by the Rural Utilities Service ("RUS") and the Broadband Technology Opportunities Program ("BTOP") administered by the National Telecommunications and Information Administration ("NTIA") "will be required to submit a system design and project timeline, *certified by a professional engineer*, for any project requesting funds over $1 million."[4] According to the NOFA, the certification is to be made to support a showing that a project is "technically feasible" and thus eligible for an award.

Significantly, when the NOFA was first made available to the public on July 1, 2009, it did not include any requirement that the network diagram and system design be certified by a professional engineer registered in the state where the proposed funded project is located. In addition, the NOFA did not provide the specific language that a professional engineer would be required to state in the certification.

Subsequently, on or about July 7, 2009 – just 38 days before the August 14, 2009 deadline for first-round funding applications – RUS and NTIA published guidelines (the "Guidelines") for completing BIP and BTOP applications. In each case, the Guidelines provide that "[f]or Projects requesting more than $1 million in funding, the Network Diagram and System Design must be certified by a Professional Engineer *registered in the state or states where the service will be provided.*"[5]

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[2] 74 Fed.Reg. 33104 (July 9, 2009).
[3] American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (2009) ("Recovery Act").
[4] NOFA at 33110 (Section V.C.2.b.) (emphasis added). *See also* NOFA at 33115 (Section VI.D.1.a.vii.).
[5] Emphasis added. This language is at Item 31 of RUS Guidelines. The language in the NTIA Guidelines differs slightly in non-material ways.

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The RUS Guidelines also state that the engineer "must certify" that:

- the proposed broadband system will work as described in the System Design and Network Diagram sections;
- the proposed broadband system can deliver the proposed services outlined in the Service Offerings Section; and
- the Applicant can meet the proposed build-out timeframe and will substantially complete the project within two years, and fully complete it within three years.[6]

Request and Justification

The signatories to this letter request modifications of the certification requirement – modifications that are greatly needed as soon as possible in light of the fast-approaching deadline for filing first-round BIP and BTOP applications. By adopting these proposed changes, the Departments will encourage greater public participation in the application process while still preserving the intended benefits of the certification requirement – *i.e.*, the funding of "technically feasible" projects proposed by applicants.

First, the certification should be required only after an application has been selected for funding. The certification requirement should not potentially disqualify applications from Step One evaluation or Step Two consideration. At this time, applicants nationwide are preparing their grant and loan/grant applications, and many view the engineering certification requirement as a significant impediment to submitting a timely, compliant application. Many applicants lack an in-house engineer who can prepare the network diagram and system design; thus, the availability of qualified third party consulting engineers is critical. Nevertheless, the required engineering review is time- and labor-intensive, and even the most qualified and knowledgeable professional engineers may need sufficient time to "get up to speed" with respect to the technology and design of a specific proposal. If that is not possible, the applicant will need time to continue searching for a different professional engineer. These problems are compounded in light of the potential number of applications that could be prepared – there simply may not be sufficient time for professional engineers to undertake the work, analysis and review they would require as a predicate to certifying on or before August 14, 2009. In sum, the time to prepare the network diagram and system design, locate and retain a qualified professional engineer and enable the professional engineer to do the work may make it impossible for many applicants to meet the August 14 deadline.

These problems could be addressed if the Departments were to require the certification not at the initial application stage, but only for applicants selected for a grant or loan/grant. The certification requirement should not be relevant to an applicant's basic eligibility, which can be readily determined by internal RUS and NTIA engineering staff review. The absence of an

[6] *Id.* The NTIA Guidelines are functionally identical.

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engineering certification in light of the other extensive application requirements should not render an applicant ineligible for consideration. Potential applicants with solid network and system design would not concede before filing, but would rather submit applications knowing that, *if selected*, a professional engineering certification would be required before funds could be received. Professional engineers would have more time to review applications and, if necessary, to obtain reciprocity in other states. Moreover, the quality and technical feasibility of proposals should improve across the board from increased participation, both by potential applicants and professional engineers.

The signatories believe that requiring an engineering certification is appropriate as a condition to obtaining federal funding, but that as an eligibility criterion it will result in fewer applications and fewer eligible applications.

Second, the professional engineer should not be required to be registered in the state where the proposed service will be provided. Rather, it should suffice for the professional engineer to be registered in *any state* irrespective of the location of the project. Broadband engineering principles are governed by the laws of physics, not the laws of a particular state, and these principles do not vary from state to state. A professional engineer in North Dakota can apply these principles in any state if he/she is otherwise qualified. An artificial jurisdictional limitation would have the unintended results of leaving a great deal of engineering expertise "on the sidelines" and in the aggregate reducing the quality of the technical proposals submitted by applicants.

In addition, maintaining the current state certification requirement arbitrarily favors a large company with a nationwide engineering presence over smaller companies that rely on outside third party consulting engineers who may be registered in only one or a few states. For example, a small wireless company in Ohio that has utilized the services of an expert professional engineer registered in Virginia would instead be forced to find an engineer registered in Ohio – one who may have no wireless background whatsoever – merely to superficially satisfy the certification requirement. This result would appear to contravene the purpose behind the certification requirement – a demonstration of "technical feasibility."

Third, at a minimum, the language of the certification is inappropriate and should be changed because it asks the professional engineer to state with certainty that a third party – the applicant – "*will* substantially complete the project within two years, and fully complete it within three years." The engineer cannot control the applicant's compliance with the deadlines, and no qualified engineer would be likely to make such a certification. Thus, it is possible that no applicant would be able to meet this requirement because it would be unable to locate and engage an engineer with skill and experience in the proposed technology who would provide the certification the Departments require.

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As an alternative, the signatories suggest the following language for the certification:

> The undersigned, being a Professional Engineer licensed in the State of _____ and experienced in the telecommunications technology contained in the System Design, Network Diagram and Service Offerings sections of this application, certifies that the proposed broadband system is capable of operating as described and capable of delivery of the proposed services. Moreover, it is reasonable to assume the system, as designed, can meet the proposed build-out timeframe based on the resources designated in Project Viability Section, barring unforeseen issues, and can be substantially complete in two years, and complete within three years. This certification is based on the information contained in the sections cited and is true and correct to the best of my knowledge and belief.

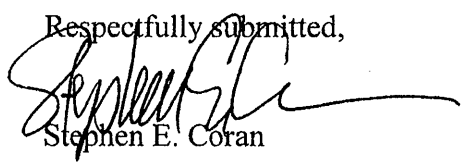
The above language not only is based on the reasonableness of the timelines, but also requires the professional engineer to be experienced in the proposed technology – a higher standard than the existing generic professional engineer certification the Guidelines now require.

Request for Expedited Action

In light of the fast-approaching August 14 deadline for the submission of Broadband Infrastructure applications, we ask that the Departments make these requested changes as soon as possible.

Please contact the undersigned counsel if there are any questions concerning this matter.

Respectfully submitted,



Stephen E. Coran

cc: Mark Seifert
Kenneth Kuchno
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Exhibit 1

List of Signatories

Wireless Internet Service Providers Association
Commnet Wireless, LLC
Gateway Telecom LLC dba StratusWave Communications
N-1 Communications dba Buzz Broadband
WiNOG Grants Cooperative – members include:
- Convergence Technologies Inc.
- Kruger Communications
- inVision Networks
- Partnership Broadband
- Microserv
- Softcom
- CommSpeed
- BeamSpeed
- Safelink
- WisperISP
- Benton Ridge Telephone / W.A.T.C.H. TV
- T6 Broadband
- Western Broadband / ECPI
- Sparkplug
- Invisimax
- Texas Wireless Internet
- Broadband VI

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Exhibit 2

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October 8, 2009

VIA E-MAIL
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Re: Review of NTIA's Organizational and Pre-award Processes for Broadband Technology Opportunities Program

Dear Mr. Bunting:

Our firm assisted several applicants for funding under the Broadband Technology Opportunities Program ("BTOP") administered by the National Telecommunications and Information Administration ("NTIA") and the Broadband Infrastructure Program ("BIP") administered by the Rural Utilities Service ("RUS"). We appreciate the opportunity to assist your office in its evaluation of the first funding round, as discussed in the September 2, 2009 memorandum from Judith Gordon to Assistant Secretary Lawrence E. Strickling.

In assisting our clients to file BTOP/BIP applications, a number of difficulties arose that complicated the submission process and applicants' ability to use time efficiently. We believe that our experiences and materials our clients have provided to us can inform NTIA as it drafts the Request for Information, Notice of Funds Availability and application materials for upcoming funding rounds.[1]

Overview

As a general proposition, we are aware of parties that intended to apply but elected to not submit applications because the process was perceived to be too time-consuming or too complicated. In other cases, applicants scaled back their projects because of the time constraints and complexities in completing and timely submitting a

[1] Some of the contents of this letter relate solely to the BIP process, but are included here because of the combined application process, the inter-relationship between the programs and the expectation that this letter may be shared with RUS administrators.

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high-quality application. These decisions resulted from a number of specific concerns, including the "front-loading" of certain requirements, an inability to obtain mapping information in a timely manner, a lack of clarity in the application guidelines and related materials and, perhaps most importantly, the fact that the online version of the application was not available until approximately July 31, 2009. Though the filing deadline was ultimately extended, this was not known at the time and would-be applicants had already decided to not file.

Definitions

"Remote Area." While well-intentioned as a means to allocate funds to areas most in need, the definition of "remote area" proved to be largely irrelevant because few areas of the country qualified. As a result, applicants were not eligible for 100% grant funding under the BIP requirements. We are aware that RUS has recognized this problem and is poised to make changes for the next funding round.

"Census Designated Community." In response to Q13 of the application form, the term "census designated community" was used (see below). The form, however, did not define this term. The Census Bureau uses the term "census designated place," but not "census designated community." Applicants thus were forced to make their own initial interpretation of "census designated community." Only after completing and submitting a map would the application system provide the names of the relevant "census designated communities." In the future, we suggest that relevant terms be defined or references to definitional sources be provided.

Application Requirements

Professional Engineer Certification. Certain of the information required in Step 1 of the application process should have been required to be submitted only in Step 2 or as a condition to closing on a grant or loan. For instance, the NOFA should not have required a certification from a professional engineer registered in the state of the project to be submitted at Step 1 for proposals of $1 million or more. While this requirement may have been intended to force applicants to submit applications with viable technical plans, in fact it prejudiced certain applicants with outside consultants registered in other states. The July 31, 2009 FAQ update modifying this requirement was helpful (at least with respect to applicants applying only for BTOP funds), but the better solution would have been to defer the certification and make it a condition to closing on the grant documents. For additional information, please see the attached copy of our letter to NTIA and RUS dated July 24, 2009.

Legal Opinion. Similarly, the requirement that applicants include a legal opinion should have been a condition to closing on the grant documents. First, it is standard in commercial transactions to require an opinion at closing, and the grant documents undoubtedly will require an acceptable legal opinion. However, at the initial application stage, the legal opinion creates unnecessary burdens on applicants. Second, the grant

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documents were not posted until a few days before the initial deadline, making it even more difficult for applicants and their attorneys to comply. Third, some lawyers with whom we coordinated were unwilling to execute the form opinion letter because they were uncomfortable with certain of the opinions. We did receive some advice from the help desk that the agencies would not require the form opinion letter to be given verbatim and that changing the language could cause delay (rather than rejection of the application), but this information simply softened a requirement that should not have been a Step 1 obligation.

Applicant Certifications. The applications required the submission of several separate certifications (for example, Attachments N-Q) that were required to be signed in ink, converted to a .pdf file and uploaded as attachments to the application. It would have been much less burdensome on applicants and would have reduced the capacity on the agencies' servers if the certifications were covered by the applicant's execution of the electronic version of the application.

Specific Application Questions. In many aspects of the application process, the Guidelines were confusing, ambiguous or inconsistent, and in some cases applicants did not know what was required until they actually logged into the online version of the application. Here are some examples:

Q12 – Mapping. By many accounts, the mapping requirement presented significant problems. First, applicants spent thousands of dollars researching vendors and purchasing mapping information only to find out later that the online application system was restricted to the agencies' proprietary software. Applicants were afforded no notice prior to seeing the online version that this would be the case. Second, applicants were unaware until they viewed the mapping tool that the information was organized according to county, not by census blocks, creating some confusion and requiring applicants to determine from other census databases where the census block boundaries were located and then overlay their census blocks on top of the county maps. Perhaps the mapping software can be upgraded to include census block overlays. Third, some applicants painstakingly researched each census block within their proposed service areas and typed these into an exhibit or response. Applicants were unaware that the mapping tool would designate the census blocks automatically. Had applicants been aware of this convenience, they could have saved many hours of time inputting the census block data. Fourth, it was not clear from the instructions what information was required on the maps.

Perhaps most significantly, it was extremely time consuming for many applicants to draw maps using the agencies' software. As another means to provide mapping data, instead of drawing maps applicants should have the option to identify and upload their census blocks in a standard format using the 15-digit FIPS code. This method would create a nationwide database and a unique number for each census block which could then be used to automatically draw the service area maps without any hand-editing and generate an internal nationwide map for the agencies' data analysis. This would have

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been much easier for applicants and would have generated maps that were more accurate than the hand-drawn maps.

We surmise that the agencies required all applicants to use the online mapping tool so that the agencies could more readily review, analyze and process the information across a standard platform. However, the method described above would have been a far better solution for applicants, without compromising the agencies' ability to have standardized data for internal analysis and future use.

Q13/14 – Proposed Funded Service Area (Last Mile Project/Middle Mile Project). The portion of this question seeking information about "census designated communities" (also referred to, perhaps confusingly, as a "census community") confused applicants. It was not clear why this information was requested because funding decisions will be based on an applicant's entire proposed funded service area, not "unserved," "underserved" or "served" sub-parts of the proposed funded service area that were either "census designated communities" or "other areas." Also, applicants had difficulty understanding that, for BIP projects, it was acceptable to designate some areas as "served," even though the proposed service area was required to meet the definition of "unserved" or "underserved." Greater clarity could have been provided here.

For BIP projects, the BTOP and BIP Guidelines and the application state that "no more than 25% of the proposed funded service area may not meet the definition of unserved or underserved at the census designated community level or does not meet the rural definition." Because of the poor phrasing of this statement, this can be erroneously construed to represent a departure from the NOFA, which requires only that 75% of the proposed funded service be rural, without respect to whether the components of the proposed funded service area are "census designated communities" or "other areas." A clearer way to state the requirement would be to state that "no more than 25% of the proposed funded service area (1) does not meet the definition of unserved or underserved at the census designated community level or (2) does not meet the rural definition."

In addition, for applicants proposing to serve multiple groups of contiguous census blocks in a single application, there may not have been sufficient space in the application to describe how each discrete area qualified as "unserved" or "underserved." This could prove to be harmful to applicants if they were unable to provide a complete explanation for each area and their applications are challenged by existing broadband providers.

We also understand that data submitted in response to these items could not be saved in the system. Applicants received an error message that the section was "incomplete" and that information could not be saved. This was the source of some frustration for applicants.

Q15 – Non-Funded Service Areas (BIP Only). This item sought demographic information about the areas outside of a BIP applicant's proposed funded service area.

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However, because eligibility for BIP is based on whether 75% or more of the proposed funded service area is rural, the information requested is not relevant to a funding decision. Stated another way, eligibility for BIP could be ascertained by calculating the land mass that is rural within the proposed funded area. Information about population, number of households and businesses and subscribers does not help determine BIP eligibility and, in fact, took applicants a significant time to assemble.

Perhaps the agencies wanted to use this item to collect information about broadband subscribership for future informational or reporting needs. In an application process that proved to be long and detailed, however, this item could have been eliminated.

Q29 – System Design. The BIP Guidelines were inconsistent with the BTOP Guidelines and the online application form and appeared to seek different information. For instance, the BTOP Guidelines and the application asked for (1) key network components, (2) for wireless, spectrum information, morphology, topology and power levels, (3) specific advantages, and (4) paths to upgrade. The BIP Guidelines asked for a very different set of data points related to network infrastructure, services to be offered and other details including, by way of example, "the total number of establishments passed." Applicants applying to both BTOP and BIP could not possibly provide the information sought by both sets of Guidelines – especially in light of the stated three-page limit – and thus were forced to choose what information to include, running the risk that NTIA or RUS may perceive the response as being incomplete. This inconsistency points out the problems associated with having two sets of Guidelines for a combined application where the agencies apparently sought different information.

Q30 – Network Diagram. The BIP Guidelines are not consistent with the BTOP Guidelines or the application itself. For instance, the BIP Guidelines ask for descriptions of redundancy and resiliency and an indication of those facilities that are leased. The BTOP Guidelines and application do not specifically require these items. Conversely, the BIP Guidelines do not specifically require the antennae height, cell site radius and approximate coverage of each wireless access point.

Applicants arguably could be compliant with BTOP requirements and not BIP requirements. Conceivably, applicants filing with both agencies (BIP first) could face application rejection for failing to comply with the BIP requirements, even where the network diagram fully responded to the BTOP Guidelines and the application. This inconsistency should be considered in reviewing first-round applications and eliminated for subsequent funding rounds.

Q31 – Certification by Professional Engineer. In addition to the points discussed above, the July 31 FAQ oddly created separate requirements for BTOP and BIP concerning the professional certification requirements. As a practical matter, applicants applying to both agencies were forced to comply with the more rigid BIP requirements such that the more lenient BTOP requirements were largely prophylactic.

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Notwithstanding, the requirements should be relaxed and harmonized in subsequent funding rounds, as discussed above.

Q47 – Historical Financial Statements. The BIP Guidelines asked for three years of historical financial statements, whereas the BTOP Guidelines and the application itself sought only two years of historical financial statements. The BIP Guidelines also requested information about parent companies, subsidiaries and affiliates, whereas the BTOP Guidelines and the application did not so specify. Applicants arguably could be compliant with BTOP requirements and not BIP requirements, and if applying to both agencies, their applications could be rejected for failing to comply with the BIP requirements. These inconsistencies should be considered in reviewing first-round applications and eliminated for subsequent funding rounds.

Q50 – Pro Forma 5-Year Financial Forecast and Assumptions. Applicants reported that inputting data by hand into a .pdf file was a tedious and time-consuming task. This was made even more difficult for applicants applying to both programs because they had to submit two separate sets of pro formas. Applicants would have preferred to have the option of using an Excel or QuickBooks format with existing company data that could be conformed to the data requested by the agencies without having to be completely re-typed (perhaps twice). We suggest that applicants be permitted to upload financial information in existing standard formats so long as the minimum substantive requirements are satisfied.

Matching Funds

In-kind Services. In general, we received many questions about what constituted in-kind services for purposes of the BTOP matching component. The BTOP guidelines could have been more explicit about what constituted in-kind services.

State Matching Funds. We note that certain states provided commitments that they would extend a portion of the 20% matching funds in the final days before the submission deadline. While we recognize that this was not a problem created by NTIA, we note that these circumstances forced applicants to re-calculate their financial information at the last minute in multiple sections of the application.

Software

Pages vs. Characters. In the BTOP and BIP guidelines, applicants were informed that certain responses (*e.g.*, Project Description, Executive Summary, Non-Discrimination/Interconnection, Management Team Resumes) would be limited to a certain number of pages. In the electronic version of the application, however, responses were limited to a certain number of characters, including blank spaces. In almost every instance, the required number of characters was smaller than the characters that could fit on the page limit stated in the Guidelines. Thus, diligent applicants that produced written responses in advance of the electronic version being available were required to edit their

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responses to reduce their size. There were a large number of responses that were affected, and the unanticipated editing time took time away from applicants who reasonably believed that these responses were complete well in advance of the deadline.

We also understand that at least one section (Section D) would not accept commas in the text box. There was no notice that the text box would not accept commas, and applicants were left to discover the reason by trial and error.

Clarity of Instructions; Completeness of the Application; Error Messages. We are aware of one case where the applicant was unable to submit its application because the software did not indicate that certain fields needed to be completed (even where the answer was "$0" or "not applicable") and the error message did not state with specificity what particular response was not complete (*i.e.*, which item or which "required" attachment). In this case, the applicant indicated that it proposed to provide a certain amount of its 20% match in cash and, because it proposed to contribute no in-kind services, left that response blank. The application did not inform applicants that the in-kind field needed to be completed even if the response was $0, and the error message only reported that the section of the application – not the response – was incomplete. Had the instructions been more precise and the error message been more specific, the applicant would not have been forced to seek a waiver in order for its application to be considered in the first funding round.

This was not an isolated problem. We are aware that other applicants that received error messages, similarly uninformed and without any guidance, figured out on their own that responses needed to be completed even if the answer was "not applicable." These applicants were able to complete and submit applications, but should not have been forced to figure out why their applications were incomplete.

Uploading. The process of creating .pdf documents and then uploading them in one of three "Supplemental Uploads" was time-consuming and burdensome. One suggestion would be to require applicants to simply upload exhibits to a designated .ftp site. Also, as noted above, certain certifications could have been included in the electronic application form and other requirements (*e.g.*, engineering certification, legal opinion) could have been deferred until closing on the grant and loan.

Combined Applications. Some applicants reported that it was confusing and burdensome to combine the BTOP and BIP applications into a single online version, and that it would have been easier for applicants to submit two separate applications – albeit with some duplication – rather than submitting one combined application. In addition, BTOP and BIP differed on what costs were eligible. As a result, it was difficult for applicants to create two different sets of financial information (if they were applying for both programs) and retain accuracy and consistency throughout the application. Alternatively, applicants may simply have taken a more conservative approach and not sought funding for costs that were eligible under BIP but not under BTOP.

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We note that all applicants may not support eliminating the combined application process, but thought it should be presented to you.

Organization. Applicants reported that they could not easily review their responses because, once the information was completed (but before submission), the information would be re-organized by section, not numerically, if the applicant wished to review or modify responses. This proved to be rather confusing and took valuable application preparation time away from applicants.

Password Protection. Applicants had difficulties with the password protection system. Applicants logging in to the electronic filing system were locked out if they provided the wrong password (this was probably a fairly common occurrence given that the mapping system had its own authentication system and applicants may have been working on multiple applications), and only a live technical support person could enable the applicant to log back in. There were times when a tech support person was not readily available, so applicants could have been unable to enter data into the application for a full day. While we certainly understand the need for security, other systems – such as cutting off access for five minutes – would have eliminated "dictionary" attacks without hindering the ability of applicants to enter data into the electronic application itself.

Conclusion

We appreciate the opportunity to present this information to you. Please contact me if you have any questions or if you would like to arrange a meeting to discuss the application process.

Respectfully submitted,

Stephen E. Coran

Enclosure

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Copy of July 24, 2009 Letter

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July 24, 2009

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Re: ***Notice of Funds Availability***
Broadband Initiatives Program and Broadband Technology Opportunities Program
Emergency Request to Defer and Modify Professional Engineer Certification Requirement

Dear Messrs. Villano and Wilhelm:

On behalf of a diverse group of interested parties that includes a broadband trade association, potential applicants, consultants and professional engineers,[1] we respectfully request that the Department of Agriculture and the Department of Commerce (together, the "Departments") modify their requirement that all applications seeking more than $1 million in the first round of Broadband Infrastructure funding must contain a certification from a professional engineer registered in the state where the proposed broadband service will be provided. We believe that this requirement's unintended consequence will be to dramatically limit the number and quality of applications submitted for funding. Instead, the Departments should take three actions. *First*, rather than make the certification an eligibility requirement applicable to all applications, the Departments should require that only those applicants selected

[1] The parties to this Request are listed in Exhibit 1 hereto.

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for funding must submit a certification at the time the grant or loan/grant contracts are executed. *Second*, the Departments should eliminate the requirement that the professional engineer be registered in the state where the project is located. *Third*, at a minimum, the language of the certification must be modified so that it does not represent the applicant's compliance with future build-out requirements not within the professional engineer's control. Because of the impending August 14, 2009 deadline for submitting applications in the first funding round, the signatories request that this action be taken as soon as possible by notice placed on the www.broadbandusa.gov web site and by publication in the Federal Register.

Background

In the Notice of Funds Availability ("NOFA"),[2] the Departments detailed the requirements for the filing of applications for federal funding under the Section 6001 of the American Recovery and Reinvestment Act of 2009.[3] Although not specifically required by the Recovery Act, the NOFA states that applicants seeking funding under the Broadband Initiatives Program ("BIP") administered by the Rural Utilities Service ("RUS") and the Broadband Technology Opportunities Program ("BTOP") administered by the National Telecommunications and Information Administration ("NTIA") "will be required to submit a system design and project timeline, *certified by a professional engineer*, for any project requesting funds over $1 million."[4] According to the NOFA, the certification is to be made to support a showing that a project is "technically feasible" and thus eligible for an award.

Significantly, when the NOFA was first made available to the public on July 1, 2009, it did not include any requirement that the network diagram and system design be certified by a professional engineer registered in the state where the proposed funded project is located. In addition, the NOFA did not provide the specific language that a professional engineer would be required to state in the certification.

Subsequently, on or about July 7, 2009 – just 38 days before the August 14, 2009 deadline for first-round funding applications – RUS and NTIA published guidelines (the "Guidelines") for completing BIP and BTOP applications. In each case, the Guidelines provide that "[f]or Projects requesting more than $1 million in funding, the Network Diagram and System Design must be certified by a Professional Engineer *registered in the state or states where the service will be provided.*"[5]

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[2] 74 Fed.Reg. 33104 (July 9, 2009).
[3] American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (2009) ("Recovery Act").
[4] NOFA at 33110 (Section V.C.2.b.) (emphasis added). *See also* NOFA at 33115 (Section VI.D.1.a.vii.).
[5] Emphasis added. This language is at Item 31 of RUS Guidelines. The language in the NTIA Guidelines differs slightly in non-material ways.

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The RUS Guidelines also state that the engineer "must certify" that:

- the proposed broadband system will work as described in the System Design and Network Diagram sections;
- the proposed broadband system can deliver the proposed services outlined in the Service Offerings Section; and
- the Applicant can meet the proposed build-out timeframe and will substantially complete the project within two years, and fully complete it within three years.[6]

Request and Justification

The signatories to this letter request modifications of the certification requirement – modifications that are greatly needed as soon as possible in light of the fast-approaching deadline for filing first-round BIP and BTOP applications. By adopting these proposed changes, the Departments will encourage greater public participation in the application process while still preserving the intended benefits of the certification requirement – *i.e.*, the funding of "technically feasible" projects proposed by applicants.

First, the certification should be required only after an application has been selected for funding. The certification requirement should not potentially disqualify applications from Step One evaluation or Step Two consideration. At this time, applicants nationwide are preparing their grant and loan/grant applications, and many view the engineering certification requirement as a significant impediment to submitting a timely, compliant application. Many applicants lack an in-house engineer who can prepare the network diagram and system design; thus, the availability of qualified third party consulting engineers is critical. Nevertheless, the required engineering review is time- and labor-intensive, and even the most qualified and knowledgeable professional engineers may need sufficient time to "get up to speed" with respect to the technology and design of a specific proposal. If that is not possible, the applicant will need time to continue searching for a different professional engineer. These problems are compounded in light of the potential number of applications that could be prepared – there simply may not be sufficient time for professional engineers to undertake the work, analysis and review they would require as a predicate to certifying on or before August 14, 2009. In sum, the time to prepare the network diagram and system design, locate and retain a qualified professional engineer and enable the professional engineer to do the work may make it impossible for many applicants to meet the August 14 deadline.

These problems could be addressed if the Departments were to require the certification not at the initial application stage, but only for applicants selected for a grant or loan/grant. The certification requirement should not be relevant to an applicant's basic eligibility, which can be readily determined by internal RUS and NTIA engineering staff review. The absence of an

[6] *Id.* The NTIA Guidelines are functionally identical.

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engineering certification in light of the other extensive application requirements should not render an applicant ineligible for consideration. Potential applicants with solid network and system design would not concede before filing, but would rather submit applications knowing that, *if selected*, a professional engineering certification would be required before funds could be received. Professional engineers would have more time to review applications and, if necessary, to obtain reciprocity in other states. Moreover, the quality and technical feasibility of proposals should improve across the board from increased participation, both by potential applicants and professional engineers.

The signatories believe that requiring an engineering certification is appropriate as a condition to obtaining federal funding, but that as an eligibility criterion it will result in fewer applications and fewer eligible applications.

Second, the professional engineer should not be required to be registered in the state where the proposed service will be provided. Rather, it should suffice for the professional engineer to be registered in *any state* irrespective of the location of the project. Broadband engineering principles are governed by the laws of physics, not the laws of a particular state, and these principles do not vary from state to state. A professional engineer in North Dakota can apply these principles in any state if he/she is otherwise qualified. An artificial jurisdictional limitation would have the unintended results of leaving a great deal of engineering expertise "on the sidelines" and in the aggregate reducing the quality of the technical proposals submitted by applicants.

In addition, maintaining the current state certification requirement arbitrarily favors a large company with a nationwide engineering presence over smaller companies that rely on outside third party consulting engineers who may be registered in only one or a few states. For example, a small wireless company in Ohio that has utilized the services of an expert professional engineer registered in Virginia would instead be forced to find an engineer registered in Ohio – one who may have no wireless background whatsoever – merely to superficially satisfy the certification requirement. This result would appear to contravene the purpose behind the certification requirement – a demonstration of "technical feasibility."

Third, at a minimum, the language of the certification is inappropriate and should be changed because it asks the professional engineer to state with certainty that a third party – the applicant – "*will* substantially complete the project within two years, and fully complete it within three years." The engineer cannot control the applicant's compliance with the deadlines, and no qualified engineer would be likely to make such a certification. Thus, it is possible that no applicant would be able to meet this requirement because it would be unable to locate and engage an engineer with skill and experience in the proposed technology who would provide the certification the Departments require.

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As an alternative, the signatories suggest the following language for the certification:

> The undersigned, being a Professional Engineer licensed in the State of _____ and experienced in the telecommunications technology contained in the System Design, Network Diagram and Service Offerings sections of this application, certifies that the proposed broadband system is capable of operating as described and capable of delivery of the proposed services. Moreover, it is reasonable to assume the system, as designed, can meet the proposed build-out timeframe based on the resources designated in Project Viability Section, barring unforeseen issues, and can be substantially complete in two years, and complete within three years. This certification is based on the information contained in the sections cited and is true and correct to the best of my knowledge and belief.

The above language not only is based on the reasonableness of the timelines, but also requires the professional engineer to be experienced in the proposed technology – a higher standard than the existing generic professional engineer certification the Guidelines now require.

Request for Expedited Action

In light of the fast-approaching August 14 deadline for the submission of Broadband Infrastructure applications, we ask that the Departments make these requested changes as soon as possible.

Please contact the undersigned counsel if there are any questions concerning this matter.

Respectfully submitted,

Stephen E. Coran

cc: Mark Seifert
Kenneth Kuchno
Michele Brooks
Gwellnar Banks

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Exhibit 1

List of Signatories

Wireless Internet Service Providers Association
Commnet Wireless, LLC
Gateway Telecom LLC dba StratusWave Communications
N-1 Communications dba Buzz Broadband
WiNOG Grants Cooperative – members include:
- Convergence Technologies Inc.
- Kruger Communications
- inVision Networks
- Partnership Broadband
- Microserv
- Softcom
- CommSpeed
- BeamSpeed
- Safelink
- WisperISP
- Benton Ridge Telephone / W.A.T.C.H. TV
- T6 Broadband
- Western Broadband / ECPI
- Sparkplug
- Invisimax
- Texas Wireless Internet
- Broadband VI

T. Lauriston Hardin, P.E.